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No. 1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,
FORDHAM UNIVERSITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

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Opinions Below

The opinion of the Supreme Court of the State of New York has not been officially reported, but is to be found at pages 35-39 of the Record on Appeal (hereafter "R.") in the court below. No opinion was written by the Appel-

late Division of the Supreme Court. The opinion of the Court of Appeals of the State of New York (App. B of Petition, pp. 35-39) will be officially reported at 4 N. Y. 2d 268.

Question For Review

Following the same procedure as in all its previous slum clearance projects, the City of New York acquired the Lincoln Square slum area by condemnation, and sold parcels of it at public auction to various "sponsors". Each of these had previously agreed (i) to bid a stated minimum at the auction and (ii) (if the successful bidder) at its own expense to demolish all buildings on its parcel, relocate all tenants, construct new buildings conforming with the City's specifications, and use the property in a specified manner designed to prevent the recurrence of slum conditions. One of these sponsors was Fordham University, a denominational institution.

The going-concern slum value which the City must pay on condemnation is established on a different basis from, and will of necessity in every instance be greater than, the limited reuse value on sale to any sponsor. In the case of Fordham University, the price which it paid at auction was conceded by the petitioners, and was found by all the courts below, to be higher than the reuse value established by several unchallenged appraisals.

The question sought to be presented is whether this procedure is unconstitutional, and more particularly, whether the difference between the condemnation value paid by the City and the fair reuse value paid by Fordham University is a "subsidy" to Fordham and therefore a constitutional bar preventing the University from participating, upon equal terms with others, in this slum clearance project.

All courts below unanimously found that the claim of "subsidy" to Fordham University is without foundation in fact. Upon the undisputed facts thus found, we submit that no substantial Federal question is presented, and that the petition for certiorari should be denied.

Statement

Petitioners are neither property owners nor taxpayers, but merely occupants of residential or business space in premises within the project area.

Nevertheless, they seek to defeat, in its entirety, a slum clearance and rehabilitation plan of the City of New York upon the *sole* ground that one of the several purchasers at public auction of property within the project area is a denominational institution and that its participation in the project involves an unconstitutional "subsidy" to religion in violation of the First and Fourteenth Amendments.

The project which plaintiffs thus seek to defeat is the Lincoln Square Urban Renewal Project, covering a 13-block slum area on the west side of Manhattan, New York City roughly north of West 60th Street, south of West 70th Street and west of Broadway. In determinations not here challenged, the duly constituted agencies of New York City found the Lincoln Square area to be substandard and unsanitary, and proceeded, pursuant to Article XVIII of the State Constitution and Section 72(k) of the New York General Municipal Law to devise a plan for elimination of the slum and rehabilitation of the area. The procedure followed was precisely the same as that which had been followed in every other slum clearance project in New York City, and has been repeatedly sustained by the courts (*Kaskel* v. *Impelleteri*, 306 N. Y. 73, cert. den. 347 U. S.

934; *Murray* v. *LaGuardia*, 291 N. Y. 320, cert. den. 321 U. S. 771; *Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. (2d) 293, aff'd 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029; *Boro Hall Corporation* v. *Impelleteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, motion for leave to appeal denied 307 N. Y. 672).

The Lincoln Square plan calls for inclusion of four basic areas:

1. A housing development;

2. A performing arts center;

3. An institutional area for which the sponsor is the American Red Cross;

4. A collegiate site of approximately 320,230 square feet to be redeveloped by an educational institution for educational use.

It is upon the fourth item that the petitioners center their attack; and it is upon the basis of that item alone that they seek to block the entire project.

The plan, like all other slum clearance projects in New York City, provided that a prospective purchaser, designated as a "sponsor" for each site in the area, should enter into an agreement with the City to bid a minimum price at public auction, and, if the successful bidder, to purchase the site, demolish the slums and reconstruct the area—not for whatever purpose the purchaser might elect—but strictly pursuant to and for the specific purpose set forth in the plan. The City in turn agreed to acquire each site by condemnation or otherwise, and to sell it to the sponsor at public auction, unless someone else made a higher bid to purchase the same site for the use permitted by the plan.

The advantage to the City of having sponsors is obvious. Before the City embarks on a widespread and costly plan of condemnation with a view to slum clearance, it desires some assurance that the slum will be cleared and that the property will not be left on its hands. It seeks to obtain, by way of guaranteed minimum bids, at least some idea of what the total cost will be (R. 61-2, 129). It is for this reason that every Title I project in New York City has been carried out with sponsorship bids of the same type as are involved here. Indeed, petitioners' brief in the Appellate Division went so far as to assert (pp. 23-24) that if the City in this or any other instance had set up a collegiate site without having "a visible purchaser" already committed as sponsor to take it, the City's action would have been "arbitrary, capricious and unreasonable".

The petitioners' complaint asserts that Mr. Robert Moses (Chairman of the Committee on Slum Clearance) announced that the solicitation of sponsorship bids "was widely advertised" (R. 15). Sponsorship bids were obtained for each of the four listed areas, including an offer from Fordham University to bid for the collegiate site at a minimum of $5 per square foot. Fordham's offer was thereafter increased, first to $6.75 and finally to $7 per square foot (R. 105).

The project plan was approved, pursuant to law, by the Federal Housing and Home Financing Agency, the City Planning Commission and the Board of Estimate. On February 28, 1958, the City acquired title to the project area through condemnation. On the same day a public auction was held, pursuant to Section 72(k) of the General Municipal Law, at which the sponsors successfully bid in their respective areas. Title was thereupon con-

veyed to them. Although the sponsorship agreement authorized a purchase money mortgage, Fordham paid $2,241,610 ($7 a square foot) in cash in full payment of the purchase price of the collegiate site.

Fordham University is a New York educational corporation administered by members of the Jesuit Order, although its faculty is not composed exclusively of members of that Order or persons of the Catholic faith (R. 139). Throughout its 115 year history, individuals of all races, colors and creeds have been, and will continue to be, included in its student body. During its entire existence no applicant has ever been denied an opportunity for education at Fordham because of race, creed, color or national origin (R. 136-9).

Indeed Section 501 of Article V of the sponsorship contract between the City and Fordham* provides:

> "The sponsor shall not discriminate against or segregate any person seeking accommodation in any structure in the Collegiate Site because of that person's race, color, religion, national origin or ancestry."

On the parcel acquired by Fordham, which constitutes approximately 15% of the total project area, Fordham proposes to locate its Schools of Education, Law, Business and Social Service.

The prices paid by all sponsors—were based upon appraisals approved by both federal and municipal authorities. In fact, and as found by all courts below, the $7 figure Fordham agreed to, and did, bid was based not upon the educational reuse to which the University

*Copy annexed to Fordham's answer to the complaint; omitted by stipulation in the printed record; copies submitted herewith.

will devote the property, but upon the much more valuable reuse for housing purposes. This $7 figure, as petitioners conceded in the Court of Appeals (their brief p. 10) and as that Court found, was actually in excess of the appraisal figures for the more valuable housing use. The record shows without contradiction that the appraisal figures for the housing use were $6.71 and $6.50 respectively (R. 129-130), while the appraisal figures for educational use was only $4.84 (R. 129).

Petitioner sued for a declaratory judgment and an injunction. At Special Term of the New York Supreme Court both sides moved for summary judgment, both sides asserting that no disputed issue of fact was presented. The Special Term, unanimously affirmed by all twelve judges of the two appellate courts, found that there was no substance to petitioners' claim and dismissed their complaint.

ARGUMENT

The thrust of petitioners' contention in the New York Supreme Court was that the transaction somehow resulted in "aid or maintenance" to Fordham University in violation of Article XI, section 4 of the New York State Constitution, and also in violation of the Fourteenth Amendment of the United States Constitution. Petitioners' secondary argument was that the condemnation of the slum was for a private purpose in violation of Article I, section 7 of the New York Constitution and the Fourteenth Amendment.

These contentions fell with the finding of the court of first instance, on the facts, that no aid or maintenance was conferred upon Fordham, and that, in fact, the condemnation was for a public purpose (R. 203, 207). In

the Appellate Division petitioners extended their same contentions by alleging the illegality of Title I.

The Appellate Division and Court of Appeals each unanimously affirmed the findings of the Supreme Court.

Thus, petitioners seek to invoke the aid of this Court on a record which establishes, as the New York courts have unanimously found, that there is no "aid" or "subsidy" to Fordham, and that the condemnation of the blighted area was for a public purpose.

And we have it of record that petitioners "believe that the record herein does not present a genuine issue of fact" (R. 165).

I.

No Substantial Federal Question is Presented.

The complete lack of merit in petitioners' case, and the total absence of any substantial Federal question, are demonstrated by the unanimous reasoning of the Court below (4 N. Y. 2d 268, 275-6):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. *The argument, however, proceeds on an assumption false in fact.* Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. *Ford-*

ham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. *There is in this record no dispute of the fact, found by both courts below*, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. *Therefore, there is no substance to the assertion, on which this whole suit depends*, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"*Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding.*"

The somewhat garbled series of extracts from this opinion set forth at page 18 of the Petition significantly omit the portions above italicized.

Little more need be added. It may be observed, however, that throughout the nation the Courts have consistently held that there is no grant or subsidy to a private redeveloper when land is acquired by a city for slum clearance purposes and thereafter sold at a price which is less than the purchase or condemnation cost to the city, but is the fair value of the land for uses specified in the redevelopment plan. (*State* v. *Land Clearance for Redevelopment Authority of Kansas City*, 364 Mo. 974, 989, 270 S. W. 2d 44; *Velishka* v. *City of Nashua*, 99 N. H. 161, 106 A. 2d 571, 575-6; *People* v. *City of Chicago*, 414 Ill. 600, 111 N. E. 2d 626; *Gilbert* v. *City of Dayton*, 59 N. E. 2d 954, 959 [Ohio Ct. of App.]; *Furlong* v. *South Park Comm'ers*, 340 Ill. 363, 172 N. E. 757; *Foeller* v. *Housing Authority of Portland*, 198 Ore. 205, 256 P. 2d 752, 767).

It has likewise been held throughout the nation that the exercise by a municipality of its power of eminent domain and the use of public funds to acquire slum areas serves a public rather than a private purpose, even though there be a resale of the property to private enterprise. (*Burt* v. *City of Pittsburgh*, 340 U. S. 802 [opinion *per curiam*]; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, 52 N. E. 2d 884, cert. den., 321 U. S. 771; *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *In re Harlem Slum Clearance Project*, 114 N. Y. S. 2d 787, aff'd 281 App. Div. 1024; *Allydonn Realty Corp.* v. *Holyoke Housing Auth.*, 304 Mass. 288, 23 N. E. 2d 665; *In re Slum Clearance in City of Detroit*, 331 Mich. 714, 50 N. W. 2d 340; *Nashville Housing Auth.* v. *City of Nashville*, 192 Tenn. 103, 237 S. W. 2d 946; *Opinion of the Justices*, 254 Ala. 343, 48 So. 2d 757; *Robinette* v. *Chicago Land Clearance Commission*, 115 F. Supp. 669 [N. D. Ill.], motion for leave to file petition for writ of mandamus denied, sub. nom. *Robinette* v. *Campbell*, 342 U. S. 940).

Congress expressly stated the purpose of Title I to be the elimination of substandard housing through the clearance of slums and blighted areas and added that "appropriate local bodies" shall be assisted to undertake slum clearance and community redevelopment programs (63 Stat. 413; 42 U. S. C., sec. 1441). The federal funds are paid not to any private redeveloper, but only "to local public agencies" (63 Stat. 416, as am.; 42 U. S. C., sec. 1453). As Commissioner Follin of the Urban Renewal Administration—Housing and Home Financing Agency, in the Sundwall Memorial Lecture at the University of Michigan on May 3, 1955 (printed as Urban Renewal Administration Bulletin No. 2) stated (p. 18):

> "Federal assistance for urban renewal projects may be given only to local public agencies duly authorized by State and local law to carry out the various activities involved in urban renewal projects."

The federal grant—and the City's own funds—will be used for a single purpose, viz.,—to enable the City to condemn a slum area with a view to its elimination. No portion of the federal funds ultimately received by the City will be given to the private redevelopers, nor will those funds in anywise be applied to offset the costs of relocation, demolition and reconstruction incurred by the private redevelopers under their agreements.

In the case at bar, the procedure followed was precisely the same as that which the City of New York has uniformly followed in all of its slum clearance projects, and which has been repeatedly sustained by the courts.

In two of those cases, institutions of higher learning were among the sponsors who bid for and secured parcels —New York University in the Washington Square Project

(*Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029) and Long Island University in the Fort Greene Project (*Boro Hall Corp.* v. *Impellitteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, motion for leave to appeal denied 307 N. Y. 672).

All courts below have found as fact—and it is incontrovertible—that the City bought one thing, and sold something entirely different, to each of the purchasers here, including Fordham.

The City *acquired*, by lawful condemnation, property as presently in use, encumbered by substandard slum buildings, and will pay for them as it must, upon that basis.*

What the City *sold* to Fordham (and the other successful bidders) was a tract of land on which Fordham (and the others) will be required, *at their own expense* (which of course adds to the cost of the land) to:

(1) relocate all existing tenants;

(2) demolish all existing structures; and

(3) rebuild the site, in Fordham's case, for educational purposes, according to the Urban Renewal Plan.

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* The complaint alleges that the collegiate site will cost the City, on condemnation, more than $16 per square foot (R. 15). This allegation, together with petitioners' assumption throughout the Petition (eg. pp. 3, 4, 14, 16) that there is a $3,500,000 difference between the cost of acquisition and the dollar amount paid directly to the City by Fordham, is, of course, conjectural since the acquisition cost cannot be determined until the granting of awards in condemnation. Accordingly, since the City bought one thing and Fordham, for good and valuable considerations, bought another, petitioners do not make out a constitutional question by their misleading attempt to compare the price which each paid for that which each purchased.

Thus, the consideration to the City was not merely the purchase price in dollars but in addition the substantial (and costly) obligation of each sponsor to carry out the public purpose for which the property was condemned—slum clearance and rehabilitation.

Both in the Court of Appeals and here petitioners conceded (Brief below, pp. 32-3; Petition, p. 3)

> "The highest price obtained at public auction of the collegiate site may have been the highest marketable price for collegiate purposes."

They argue nevertheless that the restriction to educational purposes in some way stifled competitive bidding.

Petitioners, however, have also asserted (R. 34-35):

> "If the collegiate sponsor was Columbia University, New York University or some other college not affiliated with a particular religious group, objections to the project on the grounds of subsidy would be untenable."

Petitioners do not explain—nor did they attempt to explain to the courts below—precisely how a restriction of part of the project area to educational use stifled competitive bidding by reason of Fordham's sponsorship, but would not have stifled competition had the sponsor been Columbia or New York University.

It is indisputable that modern urban renewal authorities recommend incorporation of an educational area into urban renewal development programs (see authorities collated in affidavit of Mr. Robert Moses, R. 50-60). This Court too has stated, in upholding the District of Columbia Redevelopment Act of 1945, that "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only

new homes but also *schools, churches,* parks, streets and shopping centers." (*Berman* v. *Parker,* 348 U. S. 26, 34-35;* emphasis ours).

The Lincoln Square Plan did not of course require that the redeveloper of the site should be Fordham University or any other denominational institution. Petitioners themselves point out that the solicitation of sponsorship bids "was widely advertised" (R. 15), and that other schools and universities had been contacted, but without success (R. 153). There is no basis in the record for the repeated assertion in the petition that the educational portion of the project was adopted solely for Fordham's benefit, and indeed even petitioners' complaint contained no such allegation.

In sum, petitioners here simply challenge the contract between Fordham and the City. We submit that the contract is based upon a fair exchange of considerations between the parties. Fordham bid for the property as any other organization or person could have done. Fordham received neither more nor less than any other bidder would have received. There is, and can be, no proof—of record or otherwise—that Fordham has received a gift or subsidy. The First Amendment neither requires nor permits Fordham University to participate in any such contract upon terms more onerous to it than would be required of others.

The full impact of petitioners' claim on this score is clearly exposed by this language in the petition (p. 17):

> "* * * we think this Court will hold that a religious institution may not participate in an urban

*On page 20 of the Petition petitioners seem to suggest that this Court overrule *Berman* v. *Parker*.

> renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains".

This amounts to saying that it is inherently unconstitutional for any denominational institution to participate in a Title I project upon any practicable terms; and that such institution could not participate upon the same terms as all others. In the case at bar petitioners say in substance that Fordham could not constitutionally acquire title to the educational area at public auction even if it were the highest bidder, unless its bid at least equalled $16 per square foot—the assumed "full acquisition cost" of the property. Petitioners have contended that Columbia University or New York University, for example, need bid only the fair reuse value of the land, should they choose to participate in a Title I project, but Fordham University must bid the cost of acquisition of the land by the City. Thus, assuming that Fordham were to bid $15 per square foot and a non-denominational bidder such as Columbia University were to offer $7, the property, under petitioners' construction of the First and Fourteenth Amendments, would have to be knocked down to Columbia.

At the argument in the Court of Appeals, petitioners' counsel made their position perfectly clear. Judge Fuld there inquired whether petitioners' contention did not amount in effect to placing all denominational institutions in a position inferior to all others. Petitioners' counsel unhesitatingly answered in the affirmative and added that in his view this was what the Constitution requires.

That this asserted position of inferiority would deprive Fordham of its constitutional rights seems clear. While the First and Fourteenth Amendments forbid any legislative "establishment" of religion, they equally forbid

any law "prohibiting the free exercise thereof". This means, as this Court held in *Everson* v. *Board of Education*, 330 U. S. 1, 18:

> "State power is no more to be used so as to handicap religions than it is to favor them."

And as declared in *Zorach* v. *Clauson*, 343 U. S. 306, 314:

> "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

What petitioners here seek to impose is a theory of government hostility to religion which has no basis in our Constitution and the implications of which would become more and more far-reaching as slum clearance projects multiply and as town and city planning embraces ever widening areas. Upon petitioners' theory it would be practically impossible for any institution, whether educational or otherwise, having denominational affiliations, to find entrance into a planned community (*cf. Berman* v. *Parker*, 348 U. S. 26, 34-5).

The Court of Appeals found (App. B. p. 39) that

> "since this sale is an exchange of considerations and not a gift or subsidy no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding".

Try as they may, these petitioners, on the undisputed facts as found, cannot torture this decision into raising any substantial federal constitutional question.

II.

Petitioners have no Standing to Maintain this Application.

In the courts below the parties-plaintiff included 64th St. Residence, Inc. and 89 Amsterdam Avenue Corporation, owners of property in the Lincoln Square area who brought the action as taxpayers chalienging Fordham's participation in the project, and also the present petitioners. These two taxpayers have dropped out of the action and are not petitioners in this Court.

The remaining parties, petitioners herein, are merely tenants in the area, whose landiords were never plaintiffs. We submit that these petitioners have not suffered and will not suffer damages recognizable in law, and therefore have no standing to maintain this application for a writ of certiorari.

Petitioners by their application challenge the constitutionality of federal legislation (Title I of the National Housing Act) and seek to enjoin public officials from carrying it out. An injury which would justify this type of action is one arising out of invasion of "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded by the statute which confers a privilege" (*Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118, 137-8). On page 5 of petitioners' affidavit to support their application before Mr. Justice Harlan for an injunction and stay, it is admitted that any right of these tenants "would not ordinarily be the basis for the recovery of money damages".

Accordingly, we submit that the present petitioners do not have the standing of a taxpayer, much less that of a property owner, to challenge a federal statute or

to enjoin public officials from complying therewith. (See *Massachusetts* v. *Mellon*, 262 U. S. 447, 486-8; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480-1; *Elliott* v. *White*, 23 F. 2d 997, 998; *Allied-City Wide Co., Inc.* v. *Cole*, 230 F. 2d 827).*

Thus, the present application should be denied not only because petitioners have failed to establish that a substantial federal question is presented but also because petitioners have no standing to make the application.

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*On the discussion as to a stay or injunction before Mr. Justice Harlan, petitioners' counsel referred to *Parker* v. *Fleming* (329 U. S. 531) in answer to these authorities. That decision is not pertinent. It involved a controversy between a landlord and tenants under the Rent Regulations of the Emergency Price Control Act, designed for the protection of tenants. This Court held that under the provisions of that Act the tenants were entitled to review the Administrator's dismissal of their protest.

Conclusion

The decision below is clearly correct. There is no conflict of opinion. Petitioners have no standing to maintain the action. The case offered upon this record presents no substantial Federal question. The record presents mainly an ordinary contractual transaction between Fordham and the City based upon what the court below found to be "an exchange of considerations and not a gift or subsidy" (App. B. p. 39).

The petition for a writ of certiorari should be denied.

Dated May 27, 1958.

Respectfully submitted,

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